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Supreme Court, U.S.
FILED

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No:

# In the
# United States Supreme Court

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**Paul C. Nordberg,**

***Petitioner***

**v.**

**The South Street Seaport Corporation, The South Street Seaport Museum, and JPMorganChase Bank**

***Respondents***

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On Petition For A Writ of Certiorari To
The New York State Court of Appeals

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## PETITION FOR WRIT OF CERTIORARI

Paul C. Nordberg – Petitioner ***Pro-se***
3 Overhill Drive
Auburn, MA 01501
Tel: (508) 832-6443
Email: Pauldeblee@aol.com

## QUESTION PRESENTED

Were Plaintiff/Petitioner's Fourteenth Amendment rights to due process violated by a New York State trial court when that court held oral argument on defendants' motions-to-dismiss, at which hearing the trial court permitted defendants' counsel to present oral argument but did not permit the Plaintiff, who appears pro-se in this action, to address the Court?

## PARTIES TO THIS PROCEEDING

The identity of each party to proceeding is disclosed in the caption of this litigation.

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Copy of $2,900,000 Subordinated Note, issued June 14, 1973, Under Which Plaintiff/Petitioner Filed The Underlying Law Suit

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner Paul C. Nordberg respectfully prays that a writ of certiorari be issued to review the judgment dated February 22, 2006 of the New York State Supreme Court for New York County in this litigation (which carries Index No. 602871/05 in the New York County Supreme Court - Commercial Division) and the appellate affirmances of that judgement by:

1. the New York State Supreme Court's Appellate Division - First Department; and

2. the New York State Court of Appeals.

The 14th Amendment to the United States Constitution mandates each state must provide due process to each person dealing with the power of that state. In this instance the power of the State of New York is exercised by its Judicial Branch.

The proceedings below stand for the mistaken notion that due process was achieved before a political (elected) court when:

1. prominent counsel from the local community (Manhattan) was allowed to address the court on potentially dispositive motions-to-dismiss a civil law suit, but

2. the out-of-state, pro-se plaintiff in the same action was not permitted to address the court at the same hearing on the same motions-to-dismiss.

In the court system due process is the combination of rules and procedures which are intended to facilitate the goal that decisions by courts are based on the court's best efforts to deal with the matter litigated on its merits after all parties have been provided a fair opportunity to advance their positions and views as to the relevant facts and law in the dispute.

As this Court stated in Haggar v. Reclamation District, 111 US 701, 708 (1884): "*Due process of law is [a process which]...is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must provide them with an opportunity to be heard respecting the justice of the judgement sought.*"

Here the goal of fundamental fairness, which due process seeks to facilitate, has been trampled by the process employed by the state court in considering and deciding motions-to-dismiss filed by the several defendants:

- ❑ As is typical is such motion practice, the defendants were allowed to communicate

with the court in writing twice prior to the oral argument which the trial court scheduled on the motions-to-dismiss (once in their original motions; and a second time in their rebuttal pleadings on the motions-to-dismiss).

❑ Prior to the oral argument Plaintiff was allowed to advance his positions on the motions-to-dismiss a single time in his response to the motions-to-dismiss.

At the oral argument the trial court allowed lead counsel for the defendants[1], to explain to the court defendants' perception of the passage of time which was the foundation of their seminal, statute-of-limitations based, arguments. These contentions are common to each of the three (3) separate motions-to-dismiss which were then before the trial court.

Thereafter the trial court summarily and tersely adjourned the proceedings without permitting Plaintiff to address the court.

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1. At both the hearing before the Trial Court and the subsequent oral argument on the initial state court appeal in this litigation, the defendants selected counsel to defendant JPMorganChase Bank (Menachem Zelmanovitz, Esq., of the firm of Morgan, Lewis & Bockius, LLP) as their lead spokesman.

The procedural results are manifestly unfair and unjust, and constitute a denial of due process to the Plaintiff/Petitioner:

- Defendants here had three (3) separate opportunities to advance their positions to the trial court:

  (1) their original motions as filed with the trial court;

  (2) their written rebuttal pleadings on the motions as filed with the trial court; and

  (3) the unresponded-to oral presentation made by counsel for the defendants at the oral argument held by the trial court.

- By contrast Plaintiff:

  (1) was allowed to advocate to the trial court only once, in his responsive pleadings to the defendants' various motions-to-dismiss; and

  (2) was denied any opportunity whatsoever, either to argue affirmatively, or to respond the comments made by defendants' counsel, at the oral

argument/hearing on the motions-to-dismiss.

That the trial court's handling of the case in this manner has been permitted to stand by the New York State Court of Appeals amply demonstrates the need for this Court to state clearly that our constitutional concepts of due process apply equally to all persons appearing as parties in a civil action in a state or federal court.

The proceedings below stand for a concept which is the antithesis of genuine and constitutional due process: The concept that one level of due process is appropriately accorded to lawyers appearing in court, or parties in civil litigations who are represented by lawyers; and another, lower and inferior, level of due process is appropriately accorded to civil litigants who appear pro-se in such actions.

This concept of a bifurcated measure of due process rights, depending on whether a litigant is represented by counsel, creates via case law a system of unequal protection.

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## OPINIONS AND ORDERS BELOW

1. The opinion of the trial court below, dated February 22, 2006. That opinion is appended hereto as Exhibit #1.

2. The opinion of the New York State Supreme Court Appellate Division - First Department, dated September 27, 2007. That opinion is appended hereto as Exhibit #2.[2]

3. On December 28, 2007, the New York State Supreme Court Appellate Division - First Department denied, without opinion, Plaintiff's Motion-for-Rehearing, before that Court.

4. On March 18, 2008, the New York State Court of Appeals denied, without opinion, Plaintiff's Motion for Leave to Appeal to that Court.

5. On June 3, 2008 the New York State Court of Appeals denied without opinion Plaintiff's Motion-for-Re-argument before that Court. (Exhibit #3 hereto)

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[2] Each of the New York State appellate courts which reviewed this case, in addition to entering decisions and orders adverse to the Plaintiff, assessed "costs" against the Plaintiff. The assessment of costs is a noticeable exception, rather than the norm, in the State of New York's appellate court system. These assessments may be indicative of an instinctive hostility of those appellate courts to the notion of pro-se litigants imposing on those courts' time and resources.

## JURISDICTION

This is an appeal from a final decision of the court of last resort of the State of New York (the New York State Court of Appeals). That decision was rendered by the New York State Court of Appeals on June 3, 2008. This appeal is timely within the ninety (90) time deadline set forth at Rule #13 of this Court.

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## CONSTITUTIONAL PROVISION INVOLVED

This appeal is based on the 14th Amendment to the United States Constitution.

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## STATEMENT OF THE CASE

Plaintiff/Petitioner commenced this action in the Commercial Division of the New York State Supreme Court (New York County) in August, 2005. This action seeks relief, in the form of money judgments, against three (3) separate defendants:

1. The action seeks a money judgment for the unpaid principal amount plus the unpaid accrued interest on a $2,900,000

Subordinated Note (the "Subordinated Note;" Exh. #4 hereto) owned by Petitioner/Plaintiff.[3] This judgment is sought against the current prime obligor under the Subordinated Note, defendant The South Street Seaport Corporation (the "Corporation").

2. The action seeks a money judgement for the unpaid principal and the unpaid accrued interest on the Subordinated Note from defendant The South Street Seaport Museum (the "Museum"). The Museum was the prime obligor on the Subordinated Note when that security was issued. This judgment is sought on a theory of piercing the corporate veil between the Museum and the Corporation.

3. The action also seeks a money judgment against defendant JPMorganChase Bank (the "Bank"). This count, in which both actual damages and punitive damages are sought, is based on allegations that the

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[3] Plaintiff/Petitioner is a subsequent owner of the Subordinated Note, and all related causes-of-action, having purchased same from the original subordinated note holder, South Street Holdings, Inc. ("Holdings").

Bank engaged in intentional fraud in connection with the issuance of the Subordinated Note.

Rather than answer the complaint, each defendant filed a motion-to-dismiss the action.

1. The Corporation's motion-to-dismiss raised the single contention that a law suit to collect money under the Subordinated Note had become time-barred under the New York State statute-of-limitations on or about June 1, 2004. This motion asserted that a cause-of-action arose under the note on or about June 1, 1998 (New York State's statute-of-limitations to commence litigation on a defaulted note is six years).

2. The Museum's motion-to-dismiss raised two issues:

   A. The same statute-of-limitations defense as was raised by the Corporation; and

   B. The contention that no basis existed to justify piercing the

corporate veil separating the Corporation and the Museum.[4]

3. The Bank's motion-to-dismiss raised four issues:

A. The same statute-of-limitations issued as was raised by the Corporation and the Museum;

B. The contention that the complaint in this action failed to properly plead a cause-of-action for actual fraud against the Bank;

C. The contention that any otherwise properly pled cause-of-action against the bank sounding in fraud was time-barred; and

D. The contention that punitive damages would be unavailable under New York State law if there were a

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[4] The Corporation was organized by the Museum, approximately eight (8) years after the issuance of the Subordinated Note, for the purpose of carrying out the real-estate development related activities of the Museum. At all relevant times the Museum controlled the Corporation.

property pled and timely filed cause of action sounding in fraud against the Bank.

On December 1, 2005 the trial court held oral argument on defendants' motions-to-dismiss. At that hearing Attorney Zelmanovitz of the firm of Morgan, Lewis & Bockius, LLP, spoke for the defendants. His remarks set forth the defendants' position relating to the time frame involved over the life of the Subordinated Note and the disputes relating to that note.

The trial court judge posed no questions to defendants' counsel. Attorney Zelmanovitz spoke as he saw fit in his effort to advance the defendants' position that the law suit was time-barred.

After listening to defendants' counsel for a period of time, the trial court judge tersely announced: *"I didn't realize this case was going to take so long. You guys go away. You go back."*

It seems clear from the hearing transcript that defendants' counsel had not yet completed his intended presentation. Mr Zelmanovitz did not respond by asking the trial court judge for

more time to speak. The hearing, quite clearly, was over - without Plaintiff/Petitioner having been permitted to speak at all.

Plaintiff/Petitioner traveled more than 350 miles on December 1, 2005 (Auburn, Massachusetts to New York City and back) for the sole purpose of addressing the trial court on the then-pending motions-to-dismiss.

On February 22, 2006 the trial court entered its decision and Order (See Exhibit #1 hereto). The trial court held:

1, That any law suit to enforce the terms of the Subordinated Note had become time-barred on or about June 1, 2004.

2. That the complaint in this action failed to properly allege a cause of action sounding in fraud against the Bank, because the Bank was neither an obligor under, nor guarantor of payment under, the terms and provisions of the Subordinated Note.

3. The trial court did not reach and decide the issues of:

A. Whether the complaint properly set forth a legal basis to pierce the corporate veil between the Museum and the Corporation; and

B. Whether the remedy of punitive damages would have been available in the intentional fraud claim against the Bank had that claim been accepted by the trial court as properly pled.

Plaintiff/Petitioner appealed the trial court's decision to the New York State Supreme Court's Appellate Division - First Department (the "Appellate Division"). The Appellate Division held oral argument on the appeal on October 11, 2006, a date on which eighteen (18) cases were before that court.

By January 9, 2007, a date approximately twelve (12) weeks later, the Appellate Division decided fifteen (15) of the October, 11, 2006 cases, leaving three (3) undecided. This case was not then decided.

On September 27, 2007 a date almost a year after this case was argued, the Appellate Division entered its decision. That decision unanimously affirmed the trial court's holding and assessed costs against Plaintiff/Petitioner (See Exhibit #2 hereto).

The other cases from the October 11, 2006 calendar which resulted in long delays before decision were the subject of divided votes among the panel and each the subject of a vigorous dissent.

Thereafter Plaintiff/Petitioner moved for rehearing before the Appellate Division and/or Leave to Appeal to the New York State Court of Appeals. The motion was denied without opinion by the Appellate Division on December 28, 2007.

Thereafter Plaintiff/Appellant moved before the New York State of Appeals for Leave to Appeal to that court. The motion was denied without opinion by the New State Court of Appeals on March 18, 2008. In its decision the court assessed costs against Plaintiff/Petitioner.

Thereafter Plaintiff/Petitioner filed a motion for rehearing before the New York State Court of Appeals. In that motion, Plaintiff/Petitioner called to the Court of Appeals' attention his contention and belief that the New York State court system:

1. Had failed to provide him with due process, particularly but not exclusively, by its failure to allow him to speak at the oral argument held before the trial court[5]; and

2. That the combination of the adverse decisions, the lengthy delay at the Appellate Division, and the actions of several state courts (including the Court of Appeals) in taking the exceptional step of imposing "costs" against Plaintiff/Petitioner treated him unequally

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[5] The Appellate Division, having scheduled fifteen (15) minutes of oral argument for Plaintiff/Petitioner (as he had requested) on its pre-printed schedule, reduced that time period to six (6) minutes before Plaintiff/Petitioner uttered a sound at oral argument.

and unfairly because Plaintiff/Petitioner appears pro-se in this matter.

Four (4) separate counsel for defendants each then communicated with the Court of Appeals, each incorrectly representing to the Court of Appeals that Plaintiff/Petitioner had, in fact, been allowed to argue at the oral argument originally held before the trial court.[6]

Defendants' counsel next opposed Plaintiff/Petitioner's request that he be permitted to supplement the record before the Court of Appeals with a copy of the court reporter's verified transcript of the December 1, 2005 hearing before the trial court. The transcript clearly demonstrates that Petitioner was not permitted to address the trial court at the December 1, 2005 oral argument on defendants' various motions-to-dismiss.

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[6] Two of the lawyers made their representations in sworn affidavits which they submitted to the Court of Appeals; the other two did so in signed pleadings which they filed with the Court of Appeals.

The Court of Appeals granted Plaintiff/Petitioner's request to supplement the record.

On June 3, 2008 the New York State Court of Appeals denied Plaintiff/Petitioner's Motion-for-Rehearing. The court entered no opinion in connection with its denial of the motion. The order denying the motion, once again, assessed costs against Plaintiff/Petitioner (See Exhibit #3, hereto). This is the final order of the state court, with no further appellate rights existing with the New York State court system.

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## REASONS FOR GRANTING THE PETITION

### FIRST POINT: Petitioner's Rights Under the 14th Amendment Were Violated

The trial court below, and the court of last resort in the State of New York have each demonstrated that, in their views, it is appropriate in a civil case in which one party appears pro-se:

1. To schedule oral argument on potentially dispositive motions-to-dismiss; and

2. At the oral argument allow only the party or parties who are represented by counsel to speak or argue.

Defendants/Respondents argued below that there is no "right' to oral argument on potentially dispositive motions-to-dismiss a civil law suit. That misses the point.

The proper question is whether a trial court can ever have discretion:

1. To schedule and hold oral argument;

2. To allow one side to speak or argue as it sees fit. AND

3. Then provide no opportunity for the other side to argue, even to the extent of responding to what his adversaries' counsel has just stated to the judge.

As this Court noted in Societe International v. Rogers, 357 U.S. 159, 209 (1958)

the Constitution prohibits the government, and its courts, from *"...dismissing an action without affording a party the opportunity for a hearing on the merits of his cause."* When a court holds an oral argument at which one side is not permitted to speak that side's rights to due process and equal protection are eviscerated.

**SECOND POINT: This Case Is Symptomatic Of A Large Scale Problem**

What occurred here, or similar denials of due process and/or equal protection, likely occur regularly to pro-se litigants in civil matters.

Evidence of the likely pervasiveness of this ill-advised and unjust attitude of judges to pro-se litigants is demonstrated in the "..test of the market..." process which was long-ago suggested by Judge Richard Posner of the 7th Circuit. Judge Posner suggested that it is appropriate for courts to assume, at the outset of a case, that a civil litigant who cannot retain counsel does not have a meritorious case. (See ***"Procedural Due Process Rights of Pro Se Civil Litigant;"*** 55 University of Chicago Law

Review; 659 (1988)). That a respected jurist and legal scholar like Judge Posner urges that it is appropriate for judges to begin their handling of a civil case filed by a pro-se litigant with the bias that it is unlikely that the litigant's case has merit (not because of the facts and law relating to the law suit - but simply because a plaintiff appears pro-se in the action), and that he would so comment openly, suggests the strong likelihood that these views are widespread within the judiciary. Judge Posner's suggestion appears un-rebutted, either in subsequently published articles or subsequent statutes or case law.

While it may be true that many pro-se law suits lack merit, the same can be said of many law suits filed by lawyers on behalf of clients. The only area of debate is the ratios. It is blatantly unfair for any court, either formalistically[7] or subconsciously, to divide parties into two categories:

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[7] As appears to have occurred here by the virtue of the trial court's unwillingness to allow a pro-se party to argue at the December 1, 2005 hearing.

1. Those represented by counsel; and

2. Those unrepresented by counsel.[8]

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While it may be time consuming, and at times tedious to do so, every court has an absolute obligation to consider each litigation before it based on the facts as they appear and the court's understanding of the law as it applies to those facts. Any court which realizes it will be predisposed to review a party's pleadings as likely lacking merit, because the party appears pro-se in the action, should recognize that view

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Likewise, it is an incorrect supposition to think, as Judge Posner apparently does, that every pro-se litigant "cannot" obtain counsel. In this case, wisely or otherwise, Plaintiff/Petitioner believed the case too strong to justify significantly diluting his hoped-for recovery by either: (I) substantial hourly fees to counsel; or (II) a substantial contingent fee to counsel. Petitioner considered and rejected the proposal of established New York counsel to handle this litigation on a contingent fee basis.

Plaintiff/Petitioner has previously been party to a case decided by this Court (*See* Granfinanciera, S.A. v. Nordberg, 492 US 33 (1989)) dealing with the 7th Amendment to the United States Constitution. In that proceeding Plaintiff/Petitioner retained a well-known appellate lawyer, Professor Laurence Tribe of the Harvard Law School, to represent him.

for the bias it is, and recuse itself from cases with pro-se parties.

That this case has proceeded through three (3) levels of the New York State court system as it has suggests a pervasiveness of the error underlying this Petition for Certiorari.

Were this simply a mistake or eccentricity of a single judge, sitting in a single courtroom, this case would not have resulted in the record below. The record below, from the failure to allow Petitioner to speak at the original oral argument on the motions-to-dismiss; to the unusually lengthy delay by the Appellate Division in making the effort to pen a decision in a case perceived so deficient as to warrant the imposition of costs; to the perfunctory denial of redress by the New York State Court of Appeals - each time accompanied by the exceptional action of assessing "costs"...suggests that there is some institutional animosity in the state court system towards this case.

One theoretic explanation of what has occurred is the hypothesis that Plaintiff/Petitioner's cause of action is filed in

bad faith or is, objectively, misguided and/or frivolous.

If this case were frivolous it would seem very unlikely that the lawyers from major Manhattan law firms who represent the defendants here would be particularly impressed by their victories to date over a pro-se litigant, or inclined to tout them as substantial professional accomplishments. But that it not the case.

As Plaintiff/Petitioner called to the attention of the New York State Court of Appeals, defendants' counsel have actually made a great deal of their victories to date in this matter. For example:

> A. Counsel for the Museum is John Reilly, Esq., Managing Partner of Holland & Knight LLP, a major law firm with more then 1,100 lawyers. By the measure of its placement in and the amount of words devoted to it in his professional resume, Mr. Reilly views his victories to date in this case as the crowning achievement in a long and successful legal career.

B. In addition the Holland & Knight firm has authored and published an article describing its view of the importance of this case and its plausible effects on the rights of holders of issues of subordinate debt. This article, entitled *"Subordinated Creditors Beware,"* warned the firm's clients that, in New York, they might now have to file law suits as holders of subordinated debt even though they held contracts (the subordinated note) which clearly stated they had no *"right to receive"* any current payment under the circumstances existing at the time they would be required to file such law suits.

Bias against pro-se litigants and judicial actions and decisions based on such bias, even if instinctively understandable, are unacceptable and unconstitutional. This is because they treat a group (pro-se litigants) inferiorly, not because of the merits of the positions they take before the court system, but rather because they belong to

the group of litigants who attempt to advance cases pro-se.[9]

**THIRD POINT: Petitioner's Underlying Case Has Merit If Given The Due Process To Which It Is Entitled**

The mistakes and denial of due process below are not harmless error.

The seminal issue dealt with below was whether the New York State statute-of-limitations had run on any action under the Subordinated Note prior to August of 2005 (when Plaintiff/Petitioner filed this law suit).

It was undisputed that the applicable statute-of-limitations is six (6) years in length.

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[9] The instinctive basis for concern is elevated, here, when the judge who denies the due process:

A. Is a political (elected) judge;

B. Is nearing the end of her current term; and

C. Would rule against two mega-law firms (Holland & Knight and Morgan, Lewis & Bockius) were she to rule in favor of the out-of-state, pro-se plaintiff in this action.

Each defendant asserted that the cause-of-action under the Subordinated Note arose on or about June 1, 1998. They took this position because the front page of the Subordinated Note listed a nominal maturity date of May 31, 1998.[10]

The Subordinated Note, however, had a lengthy and iron-fisted prohibition on any money being paid to the Subordinated Note holder on or about June 1, 1998 in the circumstances that the Corporation (the obligor under the note) and the Bank (the holder of putative Senior Debt) each represented existed at all times from 1998-2004 (i.e. that the defined Senior Debt remained outstanding and unpaid). (App @ A24 - A30)

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[10] The Subordinated Note was issued in 1973 as part of a complex "loan workout" of prior debt. As was required by the Bank (who held putative "senior debt"):

A. Neither interest nor principal were payable, or allowed to be paid in any way, during the several decades which followed the issuance of the Subordinated Note; and

B. The Subordinated Note holder had no right to financial statements or other reports from the obligor under the Subordinated Note.

The section begins with the words: *"Notwithstanding any other provisions of this Note [the Subordinated Note] or any agreement under which this Note is outstanding...."* (App. @ A-24), words which make clear that the section's provisions trump the nominal, hoped-for, payment date recited on the Note's first page (See Exhibit #4 at page A24).

The trial court judge, perhaps understandably, became confused while reading a tortured, compound, one hundred fifty-nine (159) word sentence in the Subordinated Note at the end of this section. (See App. @ A29 -A30). That sentence concludes with a statement that the Subordinated Note holder's rights to seek legal remedies under the Subordinated Note are *"...subject, however, to the rights in the foregoing paragraphs of the holder of the Senior Debt* [the Bank].". (@ A30)

The terms of the Subordinated Note provide the subordinated note holder a right to sue to enforce the note in only two circumstances:

1. If money payment is due under the terms and provisions of the note, and remains in default for at least sixty (60) days. As is noted above, no money was due and

payable at any time in 1998 - to the contrary the Subordinated Note's terms and provisions prohibited and payment(s) being made.[11] OR

2. If the obligor under the Subordinated Note filed for bankruptcy, was placed in receivership; assigned its assets for the benefit of creditors; etc. There is no suggestion that any of these events have ever occurred.

In short there was no legally cognizable right of action by the Subordinated Note holder in existence at any time near May-June, 1998. As appellate courts in other states have lucidly explained it is irrational to postulate that a note holder can declare a default and then commence a legally-viable law suit as a result of the issuer of a subordinated note failing to make a money payment, which payment is "*...prohibited by the*

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[11] As noted earlier the Subordinated Note holder has no right to financial statements from the Corporation, the prime obligor under the Subordinated Note. Both the Corporation and the Bank repeatedly represented, until at least 2004, that the payment status of the defined Senior Debt was such as to prohibit any payment falling due on the Subordinated Note. This law suit was filed in 2005.

*very terms of the subordination clause..*" contained in the Subordinated Note under which the law suit would be filed. (See Culp v. Tri-County Tractor, Inc. 112 Idaho 894 736 (Id Ct. Of Appeals 1987).

In addition the New York state courts including the New York State Court of Appeals, possibly driven by a tunnel-vision view that the law must surely be as described by defendants' legal counsel and not as described by a pro-se plaintiff, ignored the Court of Appeals prior holding in Kurtz v. American Export Industries, 370 N.Y.S.2d 559. There the Court ruled that a subordinated note holder has no good cause of action when the alleged default is that of a failure to make payment on the subordinated note, at a time when the circumstances of the defined Senior Debt are anticipated in the terms of the subordinated note and payment on the subordinated note is not called for in such circumstances.

The decisions below are equally off point in connection with the fraud claims. The essence of the fraud claim is simple:

1. At the closing of a complex "troubled loan workout" the original Subordinated Note holder (Holdings) authorized the transfer of $8,000,000 to the Bank.

2. The Bank simultaneously signed a written contract in which it promised Holdings that the $8,000,000 would be immediately applied to the defined Senior Debt, effectively retiring the Senior Debt.

3. The Bank converted the $8,000,000.

4. From 1973-2001 the Bank sold portions of the valuable assets[12] which were intended to provide for the repayment of the alleged Subordinated Note, instead purporting to apply the proceeds to the Senior Debt which was to have been retired by the $8,000,000 cash payment arranged for by the original Subordinated Not holder at the 1973 closing of the loan workout

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The assets were in the nature of 1,400,000 square feet of "high rise development rights" which are needed to build structures more than five (5) stories tall in the Wall Street-Lower Manhattan area of New York City.

arrangement in which the Subordinated Note was issued.

5. The ultimate result was that, when the Subordinated Note fell due and payable under its terms and provisions on May 31, 2004, it immediately fell into default. This was because the Bank had sold portions of the "high rise development" rights years earlier, applying the sales proceeds to the non-existent Senior Debt which the Bank treated as still being outstanding. Those same funds, and the interest thereon, should have been available in 2004 to make payment on the Subordinated Note.

The fraud remained undiscovered for a long period time, precisely because of the Bank's fraudulent actions and inactions:

1. The Bank insisted that the Subordinated Note, in the best hypothetical circumstances (which circumstances did not occur) would not fall due (or be eligible for cash payments on account of either principal and/or interest) for at least

twenty-five (25 ) years after the note was issued.

2. The Bank, which had to approve all terms and provisions of the Subordinated Note when that note was issued, dictated that the Subordinated Note holder would have no right to financial statements from the prime obligor under the Subordinated Note. This meant that the Subordinated Note holder was systematically and intentionally deprived of the ability to know the status of the Senior Debt until May 31, 1998.[13]

It is transparently unfair for the Bank to be allowed to prevail on any statute-of-limitations defense relating to the fraud count which is founded in nothing more or less than the Bank's calculated and successful efforts to keep the fraud a secret for some 30 years.

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[13] At that time both the Bank and the Corporation represented that the defined Senior Debt was then outstanding and in default - conditions which resulted in payments on that Subordinated Note being neither due nor allowed. By 1998 the affairs of the original Subordinated Note holder ("Holdings") were under the purview of the elderly widow (Mrs. Niel Rising) of the man (Albert Rising) who was Holding's CEO in 1973.

The holding of the Appellate Division, to the effect that a putatively-well-pled fraud count was time barred is in error. The loss from the fraud only became provable and quantifiable when the Subordinated Note fell due and payable under its own terms and provisions on May 31, 2004.[14]

CONCLUSION

For the reasons set forth herein, a Writ of Certiorari should be granted.

Respectfully submitted,

Paul C. Nordberg
3 Overhill Drive
Auburn, MA 01501-2406
Tel: (508) 832-6443
Email: Pauldeblee@aol.com

August 1 ,2008

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[14] Both the Corporation and the Museum are not-for-profit organizations. Had either or both run a successful fund raising campaign in 2003 (the year before the Subordinated Note fell due and payable under its terms and provisions), as had been done on several occasions from 1980-2000, there might have been no loss here, because such independent fund raising might have allowed the Subordinated Note to be paid in full when it fell due.

# TABLE OF AUTHORITIES

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Culp v. Tri-County Tractor, Inc. 112 Idaho 894 736 (Id Ct. Of Appeals 1987). ..... 30

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Societe International v. Rogers, ..... 20

357 U.S. 159, 209 (1958)

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"Procedural Due Process Rights of Pro Se Civil Litigant;" 55 University of Chicago Law Review; 659 (1988) ..... 21, 30

# APPENDIX

# Exhibit #1

# Initial Decision, Entered February 24, 2006 By Justice Helen Freedman of the State of New York Supreme Court – Commercial Division

Supreme Court of the State of New York
Present: Helen E. Freedman, Justice
Part 36

Nordberg, Plaintiff
v.
The South Street Seaport Corp, Defendant

Index No. 602871/05

Motion Seq. No. 0001

Cross Motion Filed ___ YES XX NO

File February 24, 2006 - County Clerk's Office

The motions with sequence numbers 001, 002, 004 and 004 are consolidated for disposition.

Plaintiff Paul Nordberg, who sues as the holder of a subordinated note in principal amount of $2.9 million (the "Subordinated Note") originally issued in 1973 by the South Street Seaport Museum (the "Museum") brings this action against the Museum, its affiliate The South Street Seaport Corporation (the "Corporation")

and the holder of a senior Museum note, JP Morgan Chase Bank N.A. (the "Bank"). The Museum, the Corporation, and the Bank move separately for orders dismissing the complaint on varying grounds. For the reasons set forth below, defendants' motions are granted and the complaint is dismissed.

*Background* – The following information derives from statements in the motion papers that are not in dispute or documents that the parties submitted. The Museum issued the Subordinated Note in connection with New York City's redevelopment of the South Street Seaport area (the "Seaport") beginning in 1973. At that time, non-party Seaport Holdings ("Holdings") owned a portion of the Seaport property (the "Holdings Property"), but was in default under the mortgage note (the "Mortgage Note") for the Holdings Property held by the Chase Manhattan Bank (National Association) the predecessor in interest to the Bank.[1] To further the Seaport project, the

[1] Hereafter, the Chase Manhattan Bank (National Association) also will be referred to as the "Bank."

Holdings Property was transferred and Holdings' debt to the Bank was restructured pursuant to an agreement dated July 14, 1973, among Holdings, its parent company, the Bank and the Museum (the "Restructuring Agreement"). Under the Restructuring Agreement, (1) the Bank released Holdings and its affiliates from liability under the Mortgage Note, (2) Holdings conveyed the Holdings Property to the Museum, or New York City as the Museum's designee, (3) the Bank obtained certain development rights in the Holding Property (the "Development Rights"), (4) the Bank also received a cash payment from New York City and the promissory note of the Museum in the principal amount of $2.5 million (the "Senior Note"), (5) Holdings received the Museum's Subordinated Note, and (6) the Bank and the Museum agreed to share the proceeds from any sale of the Development Rights pursuant to a specific distribution scheme.

*Subordinated Note terms* - The Subordinated Note accrued interest from June 1980 and matured on May 31, 1998. Payment of principal of

or interest on the Subordinated note was subordinated to the prior payment in full of the Senior Note. The Subordinated Note further authorized the Bank, as the Senior Note holder, to take certain actions without the consent of or notice to the Subordinated Note holder: the Bank could change the repayment terms for the Museum's debt under the Senior Note (the "Senior Debt"), release or transfer property securing the Senior Debt, exercise or refrain from exercising its collection rights, and apply sums from whatever source to the Senior debt. Finally the Subordinated Note specified that: "[n]othing contained in this [Subordinated Note]...is intended to or shall impair, as between the Museum and the holder of this Note, the obligation of the Museum, which is unconditional and absolute, to pay to the holder of this Note the principal of, and interest on, this Note as and when the same become due in accordance with its terms..."

In December 1981, the Corporation assumed the Museum's obligations under the Senior Note and

the Subordinated Note and the Museum was released from its obligations under them. As holder of the Subordinated Note, Holdings executed the related assumption and release agreement.

*Complaint* – Nordberg acquired the Subordinated Note from Holdings in February 2005 and commenced this action in August 2005. Alleging that no payments have ever been made under the Subordinated Note and that the Bank, as the Senior Note holder, has been improperly favored, Nordberg asserts four causes of action: (1) against the Corporation for breach of the Subordinated Note, and against the Bank for an accounting of, among other things, what payments and property it has received from the Corporation and its affiliates towards payment of the Senior Debt (first cause of action); (2) a claim against the Museum for breach of the Subordinated Note on the ground that the corporate veil should be pierced; (3) a breach of contract claim against the Bank for its "failure to meet its contractual obligations to the Subordinated Note holder

pursuant to the terms of the [Restructuring Agreement]; and (4) a fraud claim against the Bank, for which Nordberg seeks punitive damages, based on "a longstanding and continuing pattern of actual fraud in connection with the transactions at issue in this law suit and [the Bank's] responsibilities under the [Restructuring Agreement]."

*Motions* – All claims are dismissed against the defendants. Any claims to recover on the Subordinated Note are time barred under CPLR 213, because plaintiff did not due within six years from when the Subordinated Note matured on May 31, 1998. Nordberg argues that the maturity date was extended until the statute of limitations had run on the Senior Note, but the Subordinated Note provides otherwise: as quoted above the Subordinated Note states that the Museum's obligations under it are unaffected by whether the Museum pays on the Senior Note. The subordination provisions define the relative rights of the two note holders; they do not effect the Museum's obligation to pay on the Subordinated

Note on May 31, 1993. Accordingly, plaintiff's claims under the Subordinated Note accrued on or before that date, and are now time barred. *See Kornfield v. TRX Techs., Inc.*, 93 A.D.2d 772, 772-773 (1st Dept. 1983) (holding that subordination provisions in notes do not affect accrual of claim)

The Museum and the Bank raise additional grounds for dismissing the claims against them. Plaintiff cannot claim against the Museum on the Subordinated Note because Holdings released it from liability in the December 1981 agreement. Even if the Museum could be held accountable for the Corporation's liabilities under an alter ego theory, claims under the Subordinated Note are time-barred.

Plaintiff lacks standing to sue the Bank for breach of the Restructuring Agreement. He lacks privity of contract with the Bank, since the Restructuring Agreement obligated the Bank to the Museum, not to the Subordinated Note holder. Nor can Plaintiff be deemed a third-party beneficiary of the Restructuring Agreement, because the contract

does not evidence any intent by the Bank to see that the Subordinated Note is paid. Plaintiff claims that the Bank's failure to pay the Museum money it was due under the Restructuring Agreement prevented the Museum from paying the Subordinated Note holder, but in that event plaintiff would be at most an incidental beneficiary of the Restructuring Agreement without standing to sue. *See e.g. Salzman v. Holiday Inn*, 48 A.D.2d 258, 261-261 (4th Dept. 1975) (explaining that, where Party A pays Party B top enable it to pay Party C, C is merely an incidental beneficiary of A's obligation to B). Nor does the Bank owe any fiduciary duty to the Plaintiff under the Restructuring Agreement, which was the product of an arms-length business transaction *See N.E. Gen. Corp. v. Wilmington Adv. Inc.*, 82 N.Y.2d 158, 162 (1993)

Finally, plaintiff fails to state an independent cause of action for fraud against the Bank. The gist of his allegation is that the bank insincerely promised to perform under the Restructuring Agreement. That claim merely duplicates

plaintiff's breach of contract claim and must be dismissed as redundant. *See First Bank of Ams. V. Motor Car Funding,* 257 A.D.2d 17, 20-21 (1st Dept. 1999) Moreover, plaintiff fails to properly plead that he reasonably relied on a misrepresentation by the Bank. Plaintiff alleges that the Bank falsely told him he was owed nothing pursuant to the terms of the Restructuring Agreement, but that amounts to no more than a disclaimer of liability, which cannot be reasonably relied upon by a plaintiff. *See Schreibmen v. Chase Manhattan Bank,* 15 A.D.2d 769, 771 (1st Dept. 1962)

ORDERED that the motions by the defendants are granted, and it is further

ORDERED that the complaint is dismissed, and it further

ORDERED that the Clerk is directed to enter judgment accordingly.

**Dated: February 22, 2006**

**Signed by: Helen E. Freedman, JSC**

CHECK ONE

X Final disposition

__ Non-final disposition

__ Do not post

**Filed: February 24, 2006 – County Clerk's Office New York**

# Exhibit #2

# Decision by the New York State Supreme Court, Appellate Division – First Department, Dated September 27, 2007

Nordberg v. South Street Seaport Corp.
2007 Slip Opinion 07057
43 AD.3d.774
September 27, 2007
Appellate Division – First Department

—[*1] Paul C. Nordberg, appellant pro se.

Wrobel & Schatz, LLP, New York (Philip R. Schatz of counsel), for the South Street Seaport Corporation respondent.

Holland & Knight LLP, New York (John J. Reilly of counsel), for the South Street Seaport Museum respondent.

Morgan, Lewis & Bockius, LLP, New York (Menachem O. Zelmanovitz of counsel), for JP Morgan Chase Bank, N.A. respondent.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered February 24, 2006, which granted defendants' motions to dismiss the complaint, unanimously affirmed, with costs.

The causes of action seeking collection on a subordinated note from the South Street Seaport Corporation, as obligor, or by piercing the corporate veil from its affiliate, the South Street Seaport Museum, are time-barred (CPLR 213 [2]) because plaintiff did not sue within six years from the date the note matured on May 31, 1998 (*see Scionti v Reid*, 238 AD2d 496 [1997]).

Contrary to plaintiff's contentions, the subordination provisions of the note do not mandate the conclusion that the statute of

limitations period begins to run only when the senior note is paid or can no longer be enforced. While those provisions require that the senior debt be satisfied before the subordinated debt is paid, they expressly state that they are intended solely for the purpose of defining the relative rights of the senior and subordinate note holders; that they do not impair the obligations of the obligor to the holder to pay the principal and interest on the subordinated note when it became due in accordance with its terms; and that nothing would prevent the holder of the subordinated note from exercising all remedies otherwise permitted by applicable law upon default under the note, subject, however to the rights of the holder of the senior note (*see Kornfeld v NRX Tech.*, 93 AD2d 772 [1983], *affd on other grounds* 62 NY2d 686 [1984]; *Charles W. & Ruby W. Norton, Inc. v Leadville Corp.*, 570 F2d 911

[10th Cir 1978]; *Imtrac Indus., Inc. v Glassexport Co., Ltd.*, 1996 WL 39294, 1996 US Dist LEXIS 1022 [SD NY 1996]; *Minority Equity Capital Co., Inc. v Jackson*, 798 F Supp 200 [SD NY 1992]).

Plaintiff fares no better on his breach of contract and fraud claims against defendant JP Morgan Chase Bank, which are also untimely. According to plaintiff, the restructuring [*2]agreement was first breached at the initial closing in 1973. The six-year limitations period for breach of contract "begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong" (*Schmidt v Merchants Despatch Transp. Co.*, 270 NY 287, 300 [1936]; *Varga v Credit-Suisse*, 5 AD2d 289, 292 [1958], *affd* 5 NY2d 865 [1958]). Thus, the breach of contract claim is barred because it was not brought within six

years from its accrual in 1973, and the fraud claim is barred because it was not brought within the longer of six years from its accrual or two years from the date the alleged fraud was either discovered or with reasonable diligence should have been discovered (*see TMG-II v Price Waterhouse & Co.*, 175 AD2d 21 [1991], *lv denied* 79 NY2d 752 [1992]). In any event, dismissal of the claims against Chase is also warranted for the reasons stated by the motion court.

We have considered plaintiff's other arguments and find them without merit. Concur—Tom, J.P., Andrias, Marlow, McGuire and Malone, JJ.

# Exhibit #3

Decision Dated June 3, 2008
By the New York State
Court of Appeals – Denying
Petitioner's
Motion-for-Rehearing
Before That Court

Paul C. Nordberg, Appellant v. South Street Seaport Corp, et al, Respondents

Appeal denied with one hundred dollars costs and necessary reproductions and disbursements

# Exhibit #4

# $2,900,000 Subordinated Note Under Which Plaintiff/Petitioner Commenced His Law Suit In August, 2005

June 14, 1973

$2,900,000

FOR VALUE RECEIVED SOUTH STREET MUSUEM (the "Museum") a New York non-profit Corporation, chartered by the Board of Regents of the State of New York, hereby promises to pay to the order of Seaport Holdings, Inc., at its offices at 26 Broadway, New York, New York, or at such other place as may be designated in writing by the holder of this Note, the principal sum of TWO MILLION NINE HUNDRED THOUSAND ($2,900,000) DOLLARS in lawful money of the United States of America on May 31, 1998 and to pay interest on the unpaid principal and to pay interest on the unpaid principal sum at the rate of 3% per annum from June 1, 1980 in like money at said office on July 1, 1980 and on the first day of each month thereafter.

If the Museum shall fail to pay any installments of interest when due or (1) apply for or consent to the appointment of a receiver,

trustee or liquidator of the Museum or of all or a substantial part of the assets of the Museum; (2) be unable, or admit in writing its inability to pay its debts at they mature, (3) make a general assignment for the benefit of creditors, (4) be adjudicated bankrupt of insolvent, or (5) file a voluntary petition in bankruptcy or a petition or an answer seeking reorganization or an arrangement with creditors or to take advantage of any insolvency law or an answer admitting the material allegations of a petition filed against the Museum in any bankruptcy, reorganization or insolvency proceeding, or corporate action shall be taken by the Museum for the purpose of effecting any of the foregoing; or an order, judgment or decree shall be entered, without the application, approval or consent of the Museum, by any court of competent jurisdiction, approving a petition seeking reorganization of the Museum or appointing a receiver, trustee or liquidator of all or a substantial part of the assets of the Museum, and such order, judgment or decree shall continue unstayed and in effect for any period of 60 consecutive days,; the holder of the Note may

declare the principal of and interest thereon to be forthwith due and payable.

The principal of this Note may be prepaid in whole or in part at any time without premium or penalty provided all accrued and unpaid interest thereon is paid simultaneously therewith.

Notwithstanding any other provisions of this Note or any agreement under which this Note is outstanding (i) no payment on account of principal of or interest on, this Note, shall be made, nor shall any property or assets of the Museum be applied to the purchase or other acquisition or retirement of this Note, unless full payment on the principal amount of, and all accrued interest on, the Note dated simultaneously herewith given by the Museum to evidence its indebtedness to Seaport Holdings, Inc. in the amount of $2,500,000 payable on May 31, 1998 with interest at the rate of 3% per annum from June 1, 1976 (hereinafter called the "senior debt") has been made or duly provided for in money or money's worth, and (ii) in the event of any dissolution, winding up, liquidation, reorganization or other similar proceedings

relative to the Museum, its property or operations (whether in bankruptcy, insolvency, or receivership proceedings, or upon an assignment for the benefit or creditors, or any other marshalling of the assets and liabilities of the Museum, or a sale of all or substantially all of the assets of the Museum or otherwise), then all principals of, and interest on, the Senior Debt shall be paid in full before the holder of this Note shall be entitled to retain any payment or distribution in respect of principal or, or interest on, this Note, and in any such proceedings any payment or distribution of any kind or character, whether in cash, securities or other property, to which the holder of this Note would be entitled if this Note were no subordinated to the Senior Debt shall be paid by the liquidating trustee or agent or other person making such payment or distribution, or by the holder of this Note if received by him, directly to the holder of the Senior Debt or to the representative or representatives of such holder, to the extent necessary to make payment in full of the Senior Debt remaining unpaid after giving effect to any

concurrent payment or distribution to of for the holder of the Senior Debt. No payment or distribution of assets of the Museum to which the holder of this Note would have been entitled except for the provisions of this paragraph and which shall have been received by the holder of the Senior Debt or its representative or representatives shall, as between the Museum, its creditors, and the holder of this Note, be deemed to be a payment by the Museum to the holder of the Senior Debt or on account of the Senior Debt, and from and after the payment in full of the Senior Debt, the holder of this Note, in addition to any rights it may have hereunder, shall be subrogated to the then or existing rights of the holder of the Senior Debt to receive payments or distributions of assets of the Museum made on the Senior Debt until the principal of, and interest on, this Note shall be made in full, and no such payments or distributions to the holder of this Note of cash, property or securities, which would otherwise be payable and distributable to the Senior Debt, as between the Museum, its creditors other than the holder of the Senior Debt, and the

holder of this Note, shall be deemed to be a payment buy the Museum to the holder of this Note or on account of this Note.

In the event that the holder of this Note shall receive any payment or distribution on this Note which, to the knowledge of the holder of this Note, such holder is not entitled to retain under the provisions of the foregoing paragraph, he will hold any amount so received in trust for the holder of the Senior Debt and will forthwith turn over such payment or distribution (without liability for interest thereon) to the holder of the Senior Debt in the form received to be applied to the Senior Debt.

The holder of the Senior Debt may, at any time and from time to time, without the consent of or notice to the holder of this Note, without incurring responsibility to the holder of this Note and without impairing or releasing the obligations of the holder of this Note hereunder to the holder of the Senior Debt: (i) change the manner or place of payment or renew or alter the Senior Debt, or otherwise amend in any manner the Senior Debt or any instrument evidencing the same or any

agreement under which the Senior Debt is outstanding other than increasing the amount thereof or the interest rate thereon; (ii) sell, exchange, release or otherwise deal with any property by whomsoever at any time pledged or mortgaged to secure, or howsoever securing, the Senior Debt; (iii) release anyone liable in any manner for the collection or the Senior Debt; (iv) exercise or refrain from exercising any rights against the Museum or others; and (v) apply any sums by whomsoever paid or however realized to the Senior Debt.

So long as the Senior Debt shall remain outstanding, the holder of this Note will not bring or join with any creditor (unless the holder of the Senior Debt shall also join) in bringing any proceeding against the Museum under any bankruptcy, reorganization, adjustment of debt, receivership, liquidation or insolvency law or statute now or hereafter in effect.

The foregoing provisions regarding subordination are and are intended solely for the purpose of defining the relative rights of this holder of the Senior Debt on the one hand and the

holder of this Note on the other hand. Such provisions are for the benefit of the holder of the Senior Debt and shall be enforceable by it directly against the holder of this Note, and the holder of the Senior Debt shall not be prejudiced in its rights to enforce subordination of this Note by any act or failure to act by the Museum or anyone in custody of its assets or property. Nothing contained in this Note or any agreement under which this Note is outstanding is intended to or shall impair, as between the Museum and the holder of this Note, the obligation of the Museum, which is unconditional and absolute, to pay to the holder of this Note the principal or, and interest on, this Note as and when such shall become due in accordance with its terms, nor shall anything contained herein affect the negotiability, right to transfer or right to assign this Note, it being specifically acknowledged that this Note may be negotiated, assigned, or transferred without notice to or consent of the Museum or any third party, nor shall anything herein prevent the holder of this Note from exercising all remedies otherwise permitted by applicable law upon default under

this Note or any agreement under which this Note is outstanding, subject, however, to the rights under the foregoing paragraphs of the holder of the Senior Debt.

By Paragraph 7 of an Agreement of even date herewith among Seaport Holdings, Inc., Isbrandtsen Company, Inc., The Chase Manhattan Bank (National Association) (the "Bank") and the Museum, the Bank has agreed to pay over to the Museum certain proceeds from the sales by the Bank of development rights. The Museum agrees that upon receipt of such proceeds by the Museum, they shall be applied in reduction of the Museum's obligations under this Note.

Upon and after payment in full of the Senior debt, the interest payable on this Note shall be at the then existing prime rate of interest in place and instead of the 3% per annum rate provided herewith, except that in no event shall the interest payable hereunder exceed 6% per annum.

Upon payment in full of the Senior Debt, the Museum agrees to immediately commence payment upon the principal sum of this Note by

quarter annual payments, commencing with the first full calendar quarter following payment of the Senior Debt, each such payment to be ten (10%) per cent of the Museum's "gross space rental income" for the respective quarter annual period from premises leased by the City of New York to the Seaport under the "Uplands Lease" dated May 31, 193, and each such payment to be made with thirty (30) days of the expiration of the respective quarter annual period, and the balance to be paid as hereinabove provided.

In the event of default in payment or performance of any obligation hereunder, direct or indirect, of the undersigned to the holder, the holder may, at its option, forthwith accelerate the maturity date of this Note, and the unpaid balance hereof shall thereupon immediately become due and payable without demand or notice.

SOUTH STREET SEAPORT MUSUEM

By; Peter Stanton – President

Attest: By: (illegible)